

May 9, 2005

Civil Division-Kent County (739-7641)

Mrs. Catherine L. Calloway
514 King Street
Laurel, DE 19956

Re: **Freedom of Information Act Complaint
Against Town of Laurel**

Dear Mrs. Calloway:

On March 24, 2005, we received your complaint under the Freedom of Information Act, 29 Del. C. Chapter 100 ("FOIA"), alleging that the Town of Laurel ("the Town") violated the public records requirements of FOIA by not providing you with a "copy of the Town of Laurel Employment Agreement concerning the town manager as well as his current salary and his proposed future salaries that was voted on at last night's (February 7, 2005) town council meeting." You asked for a copy of that employment contract in a letter dated February 8, 2005 to the Town Manager. The Town Manager responded by letter dated February 8, 2005 denying your request temporarily until the proposed employment contract was reviewed by legal counsel "to make sure it was not contrary to state law, Laurel's town charter or violated any other personnel regulations."

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By letter dated March 29, 2005, we asked for the Town's response to your complaint within ten days. The Town Solicitor asked for a short extension of time, which we granted. We received the Town's response on April 15, 2005. We asked the Town for supplemental information which we received on April 22, 2005.

According to the Town, at the time you made your FOIA request on February 8, 2005, the "proposed contract was still under review and consideration by the Town Council" and subject to review by legal counsel and negotiation with the Town Manager. After review by counsel who proposed several amendments, the Council approved the final employment contract with the Town Manager on March 21, 2005. Under cover of letter dated March 24, 2005, the Town Manager sent you a copy of the final employment contract.

According to the Town, the Town Manager worked for several years without a written employment contract, but there had been talk among the Council whether a written contract might be advisable. Prior to the meeting on February 7, 2005, one of the council members downloaded a form employment contract from the website for the International City/County Management Association. At the meeting, the Town Council went into executive session to discuss "Personnel Matters." The minutes of that executive session (which the Town provided for our *in camera* review) show that the Council discussed the Town Manager's performance evaluation and his proposed employment contract with the Town.

After the executive session, the Town Council returned to public session. The minutes of the public session show that there was discussion for and against approving an employment contract with the Town Manager at that time. Several citizens expressed their concern about the Town's voting to approve the contract before the Town Solicitor had a chance to review it. One of the

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council members explained that “it seemed more economical to have [the Town Solicitor] review a contract that was agreed on by a majority of the Council.” By a vote of 4-3, a majority of the Council voted to approve the employment contract, subject to legal review by the Town Solicitor.

According to the Town, the Town Solicitor then reviewed the contract. The Town Solicitor recommended a number of changes, which resulted in five amendments to the draft contract. Those amendments were incorporated into a separate agreement signed on March 21, 2005. Under cover of letter dated March 24, 2005, the Town Manager provided you with a copy of the final employment agreement.

Relevant Statutes

FOIA provides that “[a]ll public records shall be open to inspection and copying by a citizen of the State during regular business hours by the custodian of the records for the appropriate public body.” 29 Del. C. § 10003(a).

FOIA defines a “public record” as “information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced.” Id. § 10002(g).

Legal Authority

Delaware's FOIA does not have an express exemption for draft documents.¹ In Chemical Industry Council of Delaware, Inc. v. State Coastal Zone Industrial Control Board, Del. Ch., Civ.A. No. 1216-K (May 19, 1994) (Jacobs, V.C.) ("CIC"), the board argued that it was lawful to meet in executive session to discuss draft regulations because the regulations were protected from disclosure by the common law deliberative process privilege. See 29 Del. C. §10002(g)(6) (exempting "[a]ny records specifically exempted from public disclosure by statute or common law"). If the draft regulations were not a "public record" for purposes of FOIA, then it followed that the board could discuss them in executive session because FOIA authorized the board to discuss in private documents "excluded from the definitions of 'public record' in Section 10002 of this title where such discussion may disclose the contents of such documents." 29 Del. C. §10004(b)(6). The Chancery Court rejected the board's legal reasoning because it "rests upon a claimed 'deliberative process' privilege for which no support exists in FOIA or in Delaware case law." 1994 WL 274295, at p.12.

The parties in CIC did not dispute that the draft regulations were a public record under the general definition in FOIA (Section 10002(g)), but argued whether they were exempt from disclosure under a common law deliberate process privilege. The Chancery Court did not have to consider whether a draft writing on which the author is still working is a "public record" for purposes of FOIA. The board's staff and legal counsel who drafted the regulations had already completed their work and presented the proposed regulations to the board for its review and

¹ Compare with Conn.Gen.Stat. § 1-19(b) (the Connecticut Freedom of Information Act does not require disclosure of "preliminary drafts or notes provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure").

approval.

Like Delaware, the public records laws in most other states do not have an express exemption for draft documents, but several courts have nevertheless held that drafts are not public records. The Florida Supreme Court had held that “a public record is any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type” but does not include “materials prepared as drafts or notes, which constitute mere precursors of governmental “records” and are not, in themselves, intended as final evidence of the knowledge to be recorded. Matters which obviously would not be public records are rough drafts,” Shevin v. Byron, Harless, Schafer, Reid & Associates, 379 So.2d 633, 640 (Fla. Supr. 1980).

In Gosbee v. Bendish, 512 N.W.2d 450 (N.D. Supr. 1994), a citizen sought access to the draft of a county lease for a ski resort which was still in preliminary rough draft form. The North Dakota Supreme Court held that the draft lease was not a public record for purposes of the state public information law. “While the draft lease may have contained the seeds of a potential public record, it did not germinate into one.” 512 N.W.2d at 452. The court expressed concern that requiring “its production or inspection by plaintiff would destroy or hinder the seeds of economic development before they had a chance to blossom.” Id.

We believe that the courts in Delaware would not define a “public record” under FOIA to include a working draft which the author is still revising prior to presentation to a public body. Some working drafts may be discarded in the formative stages, and never presented to a public body for consideration. Preliminary drafts might not be retained at all, or might be immediately discarded as when a word processor types over a previous draft. Literal application of the term “public record”

to include working draft documents could lead to absurd results, such as requiring a public employee to print out copies of each draft of a document on a work processor to retain for archiving.² Premature disclosure of draft contracts under negotiation also could compromise the public body's (and the public's) competitive position in those negotiations. See Coalition to Save Horsebarn Hill, 806 A.2d 1130, 1137 (Conn. App. 2002) (the state's "future ability to negotiate [leases] would be drastically impaired by disclosure of the preliminary drafts").

We caution, however, that a public body cannot affix "working draft" as a mere label to avoid the public records requirements of FOIA. In Fox v. Bock, 438 N.W.2d 589 (Wis. Supr. 1989), the city hired a consultant to advise about liability management. The consultant produced a report, but after discussion with the city's counsel was advised that certain changes had to be made (mostly to correct typographical errors). At the city's request, the consultant never finalized the report but the city took steps to implement the consultant's recommendations. The Wisconsin public records law exempted "drafts, notes, preliminary computations and like materials." Wis.Stats. §19.32(2). The Wisconsin Supreme Court held that "[w]hether a document is in 'preliminary form' and therefore not in final form is not determinative of whether it is a [public] record." 438 N.W.2d at 593. Otherwise, public bodies could circumvent the requirements of the law "by merely claiming that the report is not in final form and further changes must be made to it."

² The state archives law, 29 Del. C. Chapter 5, defines "public record" in identical language as FOIA. 29 Del. C. § 502(7). The archives law requires every public official and employee to "[r]etain and adequately protect all public records in their custody" and requires every custodian of any public records "at the expiration of the custodian's term of office, appointment, or employment, [t]o deliver custody and control of all public records kept or received by the custodian in the transaction of official business to the custodian's successor, supervisor or records officer; or, if there is none, to the Delaware Public Archives." Id. §§ 504(a)(2); 506.

Id. The strong public policy “favoring public disclosure does not allow a custodian of a record to delay or cancel delivery of the ‘final’ report in an attempt to have it qualified as a ‘draft.’” 438 N.W.2d at 593.

Under Delaware’s FOIA, we believe that once the author of a document presents it to a public body for review, then it becomes a public record even though it is in draft form and may be subject to further change at the direction of the public body. In this case, the Town Council discussed whether to enter into a written employment contract with the Town Manager during an executive session on February 7, 2005. If the Town had merely decided to refer the contract to the Town Attorney for legal review, we believe that the document would still be a draft document that had not germinated into a “public record” for purposes of FOIA. But after discussing whether to enter into a written contract with the Town Manager in executive session, the Council then voted in public session to approve the contract as written, subject to legal review. At that point, the draft became a public record and did not fall within any of the exemptions under FOIA for disclosure of public records.

The Town contends that the draft contract was exempt from disclosure under FOIA because it “constituted a personnel record exempt from disclosure based on privacy reasons.” See 29 Del. C. §10002(g)(1) (exempting from disclosure any personnel file “the disclosure of which would constitute an invasion of privacy, under this legislation or under any State or federal law as it relates to personal privacy”).

We agree with the courts in other states that, as a general rule, “the employment contracts evidencing the regular salaries paid to [public employees], and their obligations and rights, are exactly the types of records to which the Legislature intended the public to have access.” University

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System of Maryland v. Baltimore Sun Co., 847 A.2d 427, 441 (Md. App. 2004). Public employment contracts “state the rights and obligations of the [public employee] in order to earn contractual remuneration, but they are not in the nature of a performance evaluation.” Id.

We do not believe that FOIA’s personnel file exemption covers a contract between a public employee and a public body, unless the public body can point to something specific in the contract which would invade the employee’s personal privacy. We have reviewed the final contract with the Town Manager (a copy of which was provided to you) and do not find that it contains anything which might invade his personal privacy.

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Conclusion

For the foregoing reasons, we determine that the Town violated the public records requirements of FOIA by not providing you with a copy of the draft employment contract with the Town Manager after the Council voted at a public meeting on February 7, 2005 to approve the contract subject to review by legal counsel. We do not believe that any remediation is required because the Town has already provided you with a copy of the final contract.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

Malcolm S. Cobin, Esquire
State Solicitor

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cc: The Honorable M. Jane Brady
Attorney General

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